IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER B. LOONEY, Appellant.	No. 33425-9-II UNPUBLISHED OPINION

Hunt, J. — Christopher B. Looney appeals denial of his motion to withdraw his guilty plea and his sentence for child molestation. He argues that (1) he entered his guilty plea involuntarily, (2) his counsel did not effectively assist him, (3) the State breached his plea agreement in failing to recommend a Special Sexual Offender Sentencing Alternative (SSOSA)[1] at sentencing,[2] (4) cumulative error requires remand, and (5) his exceptional sentence violates *Blakely*.[3] We affirm.

FACTS

I. Child Molestation

While attending a birthday party on September 5, 2004, Christopher B. Looney touched a 12-year-old girl's vaginal area while she was sleeping. After she awoke, Looney molested her

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[1] RCW 9.94A.670.

[2] Looney further argues that the State improperly withdrew its SOSSA recommendation in retaliation for his motion to withdraw his guilty plea.

[3] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

again. Later that evening, Looney similarly molested the first victim's 11-year-old younger sister by touching her vaginal area while she was sleeping.

The two sisters spoke with Looney's daughter, who told them that Looney had also touched her inappropriately at an earlier date. She had once awakened to find her father, Looney, rubbing her vaginal area.

II. Procedure

A. Charges

The State charged Looney with one count of first degree child molestation and three counts of second degree child molestation. Looney informed the court that he had retained Richard Woodrow to appear on his behalf and that the court need not appoint counsel to represent him. Looney initially pleaded not guilty to all four counts.

In an initial appearance, Deputy Prosecutor Paul Conroy revealed a potential conflict of interest. Conroy had previously presided as a municipal judge in a Driving Under the Influence (DUI) case in which Looney had been the defendant. But as a result of a 1999 Washington Ethics Advisory Committee opinion, Conroy remained on the case, apparently without objection, while recusing himself from any future proceedings in municipal court. Looney later waived his right to speedy trial to provide additional time for defense preparation before trial.

B. Guilty Plea

Woodrow met or talked on the phone with Looney 25 times about this case. Woodrow and Looney also discussed a proposed plea agreement multiple times, going over the agreement page by page. Woodrow went over the discovery in the case with Looney and discussed potential

defenses.

In going through the discovery with Looney, Woodrow discovered that there were two pages missing from the interview with Looney's daughter. Looney knew these pages were missing before he entered his guilty plea. Because these pages were missing, Woodrow offered to file a motion to continue the change-of-plea date for a week so that he could obtain the two missing pages before Looney signed the plea agreement. But Looney did not request the continuance, and he did not see those two pages of discovery before entering into his plea agreement with the State.

At the plea hearing, the State filed an Amended Information dropping one count of second degree child molestation. Looney pleaded guilty to all three remaining counts. The State agreed to recommend a SSOSA, which typically involves a suspended prison sentence,[4] treatment by a state-certified therapist, and supervision by the Department of Corrections, if Looney took the steps to qualify for the SSOSA program.[5] Washington State Institute for Public Policy, Sex Offenses in Washington State: 1998 Update 11, *available at* http://www.wsipp.wa.gov/rptfiles/chrtbook_98.pdf.

The court questioned Looney about whether he was pleading guilty freely, knowingly, and voluntarily. Looney responded affirmatively that he understood the plea, that he had reviewed it

[4] If Looney had received a SSOSA, all but six months of his prison sentence would have been suspended.

[5] To qualify for a SSOSA, Looney was required to truthfully and completely answer all questions posed during a polygraph examination before his treatment evaluator and Certified Corrections Officer.

carefully with his attorney, that it was his free and voluntary decision, that no one had threatened him to make him plead guilty, that he was waiving his right to trial,[6] and that he understood that the judge need not follow a sentence that both parties recommend.

C. Motion to Withdraw Guilty Plea

Ten days after the plea hearing, on December 23, 2004, Looney wrote a letter to the court, asking to withdraw his guilty plea on grounds that his attorney had improperly persuaded him to accept the plea agreement by deceitfully taking advantage of his ignorance of criminal law.

Woodrow withdrew as defense counsel. The court appointed David Hatch as new defense counsel.

Represented by new counsel, Looney again moved to withdraw his guilty plea. The court again denied the motion on the ground that Looney did not meet his burden of showing that he had not entered his plea knowingly, intelligently, and voluntarily.

D. Sentencing

At sentencing, the State did not recommend SSOSA because Looney had not taken the steps necessary to qualify for SSOSA and because Looney no longer wished to pursue SSOSA. SSOSA requires a polygraph examination before sentencing; thus SSOSA was not an option at sentencing. The defense neither objected to the State's recommendation without SSOSA nor requested a SSOSA sentence. Looney moved for reconsideration of the court's denial of his motion to withdraw his guilty plea. The court proceeded with sentencing and scheduled the

[6] The trial court asked Looney if he understood that he would lose the enumerated rights on the first page of the plea agreement if he pleaded guilty; Looney responded that he did understand. The first of those enumerated rights is the right to a trial by an impartial jury.

reconsideration hearing two days later. Without considering SSOSA, the court calculated his offender score as 6 and sentenced Looney within the standard range for all counts: 70 months confinement for counts I and III[7] and 130 months for count II,[8] with the sentences to run concurrently.[9]

At the reconsideration hearing, Looney testified that, at the time of his guilty plea, he had not seen the report indicating that his daughter had initially denied the sexual contact. Woodrow testified that Looney was aware of his daughter's initial denial of sexual contact. The court disbelieved Looney, again denied the motion for reconsideration, and entered findings of fact and conclusions of law.

Looney appeals.

ANALYSIS

I. Motion to Withdraw Guilty Plea

A. Standard of Review

We review a court's denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

The defendant has the burden of proving that denial of his motion was a manifest injustice. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). Such manifest injustice must be

[7] Second degree child molestation.

[8] First degree child molestation.

[9] The sentence for count II also included a maximum life sentence, which calls for lifetime community supervision. Counts I and III included similar maximum 120-month sentences.

observable, overt, and not obscure. *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). Four indicia of manifest in justice are: (1) denial of effective assistance of counsel, (2) the plea was not ratified by the defendant, (3) the plea was involuntary, or (4) the prosecution breached the plea agreement. *Taylor*, 83 Wn.2d at 597. This list of four indicia is not exclusive. Rather, the trial court should examine the totality of the circumstances when determining whether there exists a manifest injustice in holding a defendant to his plea. *State v. Stough*, 96 Wn. App. 480, 485, 980 P.2d 298, *review denied*, 139 Wn.2d 1011 (1999).

Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Although Looney assigns error to all 37 findings of fact and five conclusions of law, he must also provide citations to the record supporting his arguments challenging these findings of fact and conclusions of law. *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998). Because Looney does not provide appropriate supporting citations to the record, the trial court's findings of fact and conclusions of law are verities on appeal.

B. Voluntariness

Looney argues that the trial court should have allowed him to withdraw his guilty plea because it was involuntary. This argument fails.

i. Strong Presumption of Voluntariness

We begin our analysis with a strong presumption that Looney voluntarily entered his guilty plea. Looney must overcome this "strong presumption of voluntariness [that] exists when a defendant completes the plea form, and admits to reading, understanding, and signing it. That presumption is 'well nigh irrefutable' when a trial court orally inquires about voluntariness." *State*

v. Smith, 87 Wn. App. 293, 296, 941 P.2d 704 (quoting *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982)), *reversed on other grounds*, 87 Wn. App. 293, 941 P.2d 704 (1997) (footnotes omitted).

Here, consistent with *Smith,* the trial court asked Looney whether he had made a free and voluntary decision to waive his right to trial and to plead guilty, whether he had read the plea agreement and carefully reviewed it with his lawyer, whether he understood it, whether he knew that the sentencing judge need not follow the State's sentencing recommendation, and whether Looney understood that he was giving up enumerated rights by pleading guilty. To all of these questions, Looney answered affirmatively.

The trial court then asked Looney if anyone had made threats or promises that had enticed him to take the deal; Looney answered negatively.

ii. Missing Discovery

Looney also argues that the absence of two pages from the transcript of his daughter's police interview rendered his plea involuntary because he was not provided with all discovery. This argument also fails.

Discovery provides adequate information for informed pleas; full disclosure reduces the chances for surprises. *See State v. Yates*, 111 Wn.2d 793, 793-99, 765 P.2d 291 (1988). Looney extrapolates from this general rule that he is entitled to have *all* discovery possible. Looney asserts, "Whether the material did or did not contain 'bombshell' information is irrelevant; it is within the purview of the defendant, with the assistance of counsel, to determine the significance of the information and determine the manner it will be used in preparation of a defense." Br.

Appellant at 31. Even accepting, without confirming, this rule for purposes of this analysis, Looney determined that the missing information was not significant because he knew about the missing pages before continuing with his guilty plea and declined his attorney's offer to seek a short continuance to obtain them.[10] Looney cannot now claim that his plea was involuntary.[11]

iii. SSOSA Recommendation

Looney argues that (1) the "SSOSA recommendation was removed by the State as retaliation for his choice to move to withdraw his plea" and that (2) he relied on the recommendation in making the plea, such that the retraction of the SSOSA rendered his earlier decision to plead involuntary. Br. of Appellant at 32. This argument also fails.

Looney told Woodrow that he wanted to plead guilty and to try for a SSOSA. The plea agreement provided that the State would recommend a SSOSA should Looney truthfully complete a polygraph test and otherwise qualify for SSOSA. During the plea hearing, the court made it clear to Looney that it did not have to accept the SSOSA sentence recommendation, even if both parties had recommended it.

The record reflects that, in spite of his earlier quest for a SSOSA, Looney ultimately

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[10] The trial court adopted as credible Woodrow's testimony that he had offered to continue the guilty plea hearing to obtain the two missing pages for Looney. The record does not show that Looney objected to this continuance. Instead, the record simply shows that Looney pled guilty, knowing that he could have the plea hearing continued. Thus, the record supports the trial court's finding that Looney voluntarily pleaded guilty, knowing that his attorney could have continued the hearing to obtain the two missing pages if necessary.

[11] Looney's actions also implicate the invited error doctrine, which prohibits a party from setting up an error below and then complaining of the error on appeal. *In re Pers. Restraint of West*, 154 Wn.2d 204, 222, 110 P.3d 1122 (2005). But we do not address this issue further because the parties do not raise it.

abandoned this quest when he (1) failed to submit to the required evaluation, including a polygraph; and (2) did not argue for enforcement of the SSOSA recommendation at sentencing. Looney chose to stop pursuing the SSOSA sentencing alternative after he pleaded guilty and instead pursued plea withdrawal.

Because ultimately Looney neither qualified for SSOSA nor wanted to pursue it, the State did not violate the plea agreement when it did not recommend SSOSA at the sentencing hearing. Looney's choice and inaction with respect to the SSOSA conditions did not render his plea involuntary.

iv. No Threat or Coercion

Looney claims that he received various threats that rendered his plea involuntary, including: (1) that he would no longer be able to have contact with his daughter, (2) that his children's mother would go to jail for contempt of court, and (3) that his children would be taken from school in patrol cars. This argument fails.

"[A guilty plea] cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception." *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *cert. denied*, 385 U.S. 905 (1966). Here, the court entered finding of fact 15, stating that the "defendant was not forced into pleading guilty in any way." Clerk's Papers (CP) at 115.

In addition, finding of fact 37 states, "At no time did Mr. Woodrow deceive or improperly influence the defendant in order to get him to accept the State's plea offer." CP at 119.

These unchallenged findings are verities on appeal. *See Hill*, 123 Wn.2d at 647. Therefore, we hold the record shows that Looney was not threatened or coerced into pleading

guilty.

v. Restriction on Witness Interviews

Looney further argues that the State's restriction on witness interviews was prosecutorial misconduct and rendered his plea involuntary. The State made it a precondition for receiving a SSOSA recommendation that defense counsel not interview the child witnesses again. The State counters that it "has a strong interest in not making little girls who have been victims of crimes have to talk about their rapes or molestations over and over again to strangers." Br. of Resp't at 20. Additionally, the State taped and transcribed its interviews of the victims, giving Looney access to that information.

Looney further asserts that (1) a plea must be knowing, voluntary, and intelligent, citing *Boykin v. Alabama,* in which a similar plea condition rendered a plea involuntary or was ruled improper, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and (2) the defendant should be made aware of all possible defenses, *State v. Haydel*, 122 Wn. App. 365, 370, 95 P.3d 760 (2004), *review denied*, 153 Wn.2d 1015 (2005). Looney does not, however, cite any case holding that a defendant becomes unaware of all possible defenses when there is a restriction on defense interviews of victims imposed through a condition in a plea offer.

On the contrary, the State has an important interest in protecting the young, child molestation victims from additional trauma. Looney knew about this limitation before he pleaded guilty; he decided to plead anyway; he cites no authority that such limitation is improper; and he has not shown that he was forced to plead guilty. Looney fails to show that the State's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *See State v. Hughes,* 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d

1039 (2004).

We hold, therefore, that Looney has not shown prosecutorial misconduct and that he has not overcome the presumption that his plea was voluntary.

C. Ineffective Assistance of Counsel

Looney next argues that his trial counsel rendered ineffective assistance based on several alleged deficiencies. We address each in turn.

i. Standard of Review

Looney had the right to representation by effective counsel for his guilty plea. *State v. James*, 48 Wn. App. 353, 361 n.2, 739 P.2d 1161 (1987). To prevail on a claim of ineffective assistance of counsel, the appellant must show that (1) "counsel's representation fell below an objective standard of reasonableness" and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This two-part standard also applies to ineffective counsel challenges in the context of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *State v. Garcia*, 57 Wn. App. 927, 932-33, 791 P.2d 244, *review denied*, 115 Wn.2d 1010 (1990).

Counsel must "actually and substantially [assist] his client in deciding whether to plead guilty." *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). When counsel misrepresents applicable law or a collateral consequence of the plea, it is grounds for withdrawal of the plea. *State v. Stowe*, 71 Wn. App. 182, 188-89, 858 P.2d 267 (1993). The standard for guilty pleas is whether counsel

actually and substantially assisted the defendant in deciding whether to plead guilty and, if not, whether the defendant would have pleaded guilty with effective advice. *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035 (1999).

ii. Failure to Obtain Discovery

Looney argues that Woodrow did not "actually and substantially" assist him because Woodrow failed to gather all discovery before advising him to plead guilty. This argument is not well taken.

A "lawyer who is not familiar with the facts and law relevant to his client's case cannot meet [the] required minimal level" of effectiveness. *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974). *Washington Practice* also "suggests" that defense counsel "[o]btain and review all discoverable evidence in the possession or under the control of the prosecution." 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 3409(2), at 12 (3rd ed. 2004). While *Washington Practice* does "suggest" that defense counsel review all discoverable evidence, there is no authority that a minor omission in discovery constitutes ineffective assistance of counsel.

Looney cannot satisfy the deficient performance prong of the two-part test for ineffective assistance of counsel. Findings of fact 3, 4, and 11 demonstrate that Woodrow substantially and actually assisted Looney. Woodrow was familiar with the facts and the law of Looney's case. Woodrow correctly surmised that Looney's daughter did not recant in the two missing pages. The trial court read the missing pages and orally found that "nothing jumps out to me that would indicate those pages themselves had any special relevance." Report of Proceedings (RP) at 116.

More importantly, Woodrow offered to move for a continuance to obtain the two missing pages, but Looney decided to plead guilty without the continuation.

The record shows that Woodrow did not perform deficiently. Because Looney cannot demonstrate deficient performance, we need not address the second ineffective-assistance prong. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

iii. Prosecutorial Conflict of Interest

Looney argues pro se that Woodrow's failure to pursue Deputy Prosecutor Conroy's possible conflict of interest constituted ineffective assistance of counsel. This argument is without merit.

Conroy had previously presided over a DUI case in which Looney was the defendant. Looney fails to satisfy the second prong of the *Strickland* test: He does not show that the trial result would have been different had Woodrow looked into the potential conflict of interest because there was no conflict of interest. The Washington Ethics Advisory Committee stated that a "part-time municipal court judge may . . . continue to act as a part-time deputy prosecuting attorney for the county." Br. of Resp't, Appendix C at 1. The committee further noted that "it is the responsibility of the judicial officer [Conroy] to evaluate each case and determine if there may be a conflict of interest or the appearance thereof, and if one does exist to either disclose the conflict or the appearance thereof and/or offer to withdraw from the case." Br. of Resp't, Appendix C at 1.

Here, Conroy disclosed the appearance of his potential conflict early in the proceedings. Following the advice of the Ethics Advisory Committee, Conroy noted that he would not "be

hearing [Looney's DUI] case in municipal court anymore, obviously." RP (9/13/04) at 7.

Because Conroy promptly disclosed the potential conflict and then avoided any conflict by withdrawing from the municipal court case, there was no prejudice to Looney's superior court criminal case.

D. Breach of Plea Agreement

Looney argues that the State breached the plea agreement by retracting the SSOSA recommendation, thereby creating a manifest injustice that required withdrawal of his guilty plea. This argument fails.

Manifest injustice may occur where the State breaches a plea agreement. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). But here, Looney fails to show how the State breached the agreement.

The plea agreement provided that the State would recommend SSOSA *if Looney made himself eligible*. But Looney did not make himself eligible: He did not submit himself to any part of the SSOSA evaluation, including a polygraph examination. Furthermore, the record reflects that Looney specifically did not want to pursue the SSOSA alternative in favor of seeking to withdraw his plea.

Accordingly, the conditional agreement to recommend a SSOSA was not triggered, and the State was under no obligation to recommend a SSOSA sentence.

II. Exceptional Sentence

Looney asserts that the trial court imposed an exceptional sentence contrary to the ruling in *Blakely v. Washington*. 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This

argument is without merit.

Looney is correct that "RCW 9.94A.712(3) does not give the sentencing court authority to impose a minimum term in excess of the standard range without satisfying *Blakely's* jury trial requirement." Br. of Appellant at 49. But Looney has misread his sentence; he did not receive a minimum term in excess of the standard range. Therefore, *Blakely* does not apply.

In his Brief of the Appellant, Looney asserts, "Judge Foscue sentenced Mr. Looney to a minimum term of 70 months and a maximum term of 120 months for Counts I and III, and a minimum term of 130 months to a maximum of life for Count II, *to be served consecutively*." Br. of Appellant at 27 (emphasis added). The sentencing order clearly states, "All counts shall be served concurrently, . . . except for the following counts which shall be served consecutively." CP at 105. But nothing is listed after the word "consecutively," thus showing that no sentences ran consecutively. Therefore, all counts ran concurrently, and there was no consecutive, exceptional sentence arguably in violation of *Blakely*.

Looney does not contest that RCW 9.94A.712 applies or that his offender score or seriousness level were calculated correctly. Instead, Looney argues that his minimum term exceeded the standard range for his crimes. For counts I and III, with a seriousness level of VII and an offender score of 6, the standard range is 57 to 75 months. RCW 9.94A.510. The minimum sentences for counts I and III, 70 months each, are within that range. For count II, with a seriousness level of X and an offender score of 6, the standard range is 98 to 130 months. RCW 9.94A.510. The minimum sentence for count II, 130 months, is within that range. Thus, the sentencing court did not exceed the minimum terms, did not impose an exceptional sentence, and

did not bring Looney's sentence within the purview of *Blakely*.

III. Cumulative Error

Because the trial court did commit any individual error, there was no cumulative error.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.